87-1238

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1987

RUSSELL T. LUND, JR.,

Petitioner,

v.

NORWEST BANK MINNEAPOLIS, N.A., and AMERICAN NATIONAL BANK AND TRUST COMPANY OF ST. PAUL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* Ted S. Meikle
FREDRIKSON & BYRON, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 347-7040

Attorneys for Petitioner

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether failure to allow a litigant to testify in response to inferences raised on cross-examination of the litigant violates due process of law and F. R. Civ. P. 43(a).

2. Whether deciding a case based on speculation and on items not in the record violates due process and is an abuse of discretion.

LIST OF PARTIES

The claims before this Court were severed for trial from a number of other claims against a number of other parties. All parties with an interest in the resolution of these severed claims are listed in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RUSSELL T. LUND, JR.,

PETITIONER,

v.

NORWEST BANK MINNEAPOLIS, N.A., AND AMERICAN NATIONAL BANK AND TRUST COMPANY OF ST. PAUL,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Russell T. Lund, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 4, 1987, with respect to which

a motion for rehearing was denied on October 22, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 825 F.2d 1249, and is reprinted in the appendix hereto, p. 22a, infra.

The memorandum decision of the United States District Court for the District of Minnesota is reported at 669 F.Supp. 284, and is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

The petitioner brought this suit as plaintiff before the United States District Court, District of Minnesota, invoking federal jurisdiction under 28 U.S.C. § 1331 and pendant and ancillary jurisdiction. Following a bench trial,

the District Court rendered its opinion and entered judgment on November 27, 1985, in favor of Respondents. See p. 1a, infra. The District Court entered an order denying Petitioner's timely-filed motion for amended findings of fact or a new trial on January 21, 1986. See p. 42a, infra.

Petitioner served and filed a notice of appeal January 28, 1986. The Court of Appeals for the Eighth Circuit entered a judgment and an opinion affirming the District Court's orders on August 4, 1987. See p. 22a, infra. On October 22, 1987, the Eighth Circuit denied Petitioner's timely-filed petition for rehearing or rehearing en banc. See p. 44a, infra.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> No person shall be. . .deprived of life, liberty, or property, without due process of law. . . .

Fifth Amendment, U.S. Constitution

FEDERAL RULE OF CIVIL PROCEDURE

Rule 43. Taking of Testimony.

> (a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

STATEMENT OF THE CASE

Petitioner's endorsement on a $342,634.69 check jointly payable to him and William Rubin was forged. The check was negotiated and the proceeds converted. Petitioner sued Respondents, two banks who had paid the check over the forged endorsement, seeking to recover damages for conversion under § 3-419 of the Uniform Commercial Code

as adopted in Minnesota. Minn. Stat. §336.3-419.[1]

Under Section 3-419, the Respondent banks faced absolute liability to Petitioner, measured by the face value of the check, for paying the check over Petitioner's forged endorsement. Respondent banks argued at trial that Petitioner's signature was not forged, claiming that Petitioner and Rubin were partners under Minnesota law and that Petitioner thus as a matter of law had authorized Rubin to affix Petitioner's endorsement on the check. Respondents'

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1 The claim was one of a number of claims, see e.g., In Re: Flight Transportation Corporation Securities Litigation, 730 F.2d 1128 (8th Cir. 1984), related to an elaborate securities fraud scheme engineered by William Rubin, who now is serving a 35-year prison sentence. Petitioner invoked federal jurisdiction under 28 U.S.C. § 1331 and pendant and ancillary jurisdiction.

entire affirmative defense thus turned on whether they could prove (1) that Rubin and Petitioner were partners at law and (2) that in fact it was Rubin who affixed Petitioner's purported endorsement on the check. (If someone other than Rubin affixed Petitioner's signature, whatever authority Rubin did or did not have was irrelevant.)

On August 28, 1985, the case came to trial before the Honorable Charles R. Weiner of the Eastern District of Pennsylvania, who was sitting as a district judge for the District of Minnesota by designation.

The Trial Court Refused to Allow Petitioner to Testify to Explain Matters Raised During His Cross-Examination.

The Respondents cross-examined Petitioner on matters relating to their defense based the claimed partnership.

Numerous times during the cross-examination, Petitioner's counsel objected to questions and to lines of questioning. Repeatedly, the trial judge assured Petitioner's counsel that Petitioner would have an opportunity to respond to such matters on redirect examination.

Yet, immediately after the completion of the cross-examination, the trial judge halted the trial, declaring it completed! The trial court had denied that most basic right of due process--the right to be heard.

Both the Trial Court and the Court of Appeals Based their Holdings on Pure Speculation.

Only one witness, the Petitioner Russell T. Lund, Jr., was called to testify at the trial. He testified that he did not affix the signature, that he did not know who did, and that he never authorized anyone to affix the signature

nor did he ever ratify the purported endorsement. The Respondent banks introduced absolutely no evidence contesting Petitioner's testimony, and absolutely no evidence as to who the forger was.

The trial court ruled that Petitioner and Respondents were partners at law. The court apparently recognized there was no evidence that Rubin was the one who affixed Petitioner's purported endorsement. Instead of finding that Rubin had signed Petitioner's purported endorsement, the court held that Petitioner's purported endorsement was legally irrelevant, because Rubin's endorsement of his <u>own</u> name on the back of the check was sufficient endorsement for both Respondent and Rubin.

However, there was no more evidence in the record as to who had

affixed the purported endorsement of Rubin than as to who had affixed the purported endorsement of Lund. The trial court based its holding on pure speculation.

The Court of Appeals not only ignored the trial court's obvious error, it also committed the same error by engaging in its own speculations as to who had affixed the purported endorsements. The court of Appeals, however, abandoned the trial court's theory that Rubin's (speculated) affixation of his own signature on the check jointly payable to him and Petitioner was sufficient endorsement.[2]

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2 As Petitioner had demonstrated in the appeal briefs, the U.C.C. states unequivocally that a check payable to two or more persons, their names joined by "and," can be negotiated "only by all of them." U.C.C. § 3-116, Minn. Stat. § 336.3-116 . The trial court's decision totally had ignored this statutory provision.

Instead, the Court of Appeals concluded:

> Rubin's status as a partner in the aircraft leasing business made him [Petitioner] Lund's agent. . . and thus provided him with the implied authority, as a partner, to endorse Lund's name on the check. . . .

Appellate Opinion, infra at 37a (emphasis added).

The Court of Appeals specifically acknowledged that the crucial factual predicate for its legal conclusion was whether Rubin was the person who affixed Petitioner's name:

> Thus, it is implicit in the argument of [Respondent banks] that Rubin signed the check both in his own name and also, acting as Lund's partner, in Lund's name.

Id., infra at 33a. But the Court of Appeals forgot that holdings must be

based on facts in evidence, not on pure speculation or argument. There was nothing in the record to indicate that it was Rubin who affixed the endorsements.

The Trial Court Expressly Relied on Various Items Outside the Record in Reaching its Decision.

In response to protestations about preventing Petitioner from testifying on redirect, the court invited supplementary submissions of evidence to be offered in writing within one week. Petitioner submitted a written offer of proof; Respondents submitted materials also. Petitioner filed written objections to Respondents' submissions. However, the trial court's handling of the items submitted effectively negated even this procedure. It is clear from the trial court's Memorandum Opinion and Order that the trial judge failed to

rule upon the additional submissions and, in fact, based his decision upon items and deposition testimony that had never been admitted into evidence.

The only testimony offered at trial was the Petitioner's. The trial court admitted only ten exhibits and one page of deposition testimony into evidence, Tr. at 47-48. Yet, in its memorandum opinion, the trial court stated: "In addition to hearing the testimony of plaintiff, the court also has before it numerous depositions and documentary exhibits." Memorandum Opinion and Order, infra at 4a. Because the trial court resorted to unidentified evidence outside the record in reaching its decision, its decision must be reversed. Indeed, the trial court record is so confused that, even at this late date, it is impossible to identify the evidence relied upon by the trial court.

For example, in support of its finding that Petitioner and his purported ex-partner owned particular property in partnership form, the trial court referred to language appearing on an insurance policy issued to another entity. The insurance policy, however, was never admitted into evidence. Moreover, Petitioner testified that he had nothing to do with insuring the aircraft. Tr. at 14, 51 and 52. There was no foundation for the insurance policy or the hearsay contained within it.

The trial court also expressly relied on extra-record portions of Petitioner's deposition testimony in reaching its determination. Memorandum Opinion and Order, infra at 10a, 11a. The trial court's reliance upon these and other extra-record items denied petitioner his right to due process and

violated the Federal Rules of Civil Procedure by denying him the opportunity to rebut the evidence or to challenge its admissibility, accuracy, or relevance.

Finally, the trial court erred by failing to allow petitioner to introduce evidence proposed in his offer of proof. Petitioner was permitted to make this offer of proof only in writing and only after the trial court had improperly adjourned the proceedings. The trial court failed to rule on this offer of proof. Neither Petitioner nor the Court of Appeals has any way of knowing whether or not the trial court in effect "admitted" this evidence and considered it.

On appeal, the Eighth Circuit brushed aside the trial court's speculation that Rubin had affixed his own

signature, the trial court's refusal to allow Petitioner to testify following his cross-examination, and it reliance on items not in evidence. The Court of Appeals addressed these issues with just fifteen words:

> We have reviewed Lund's claims of evidentiary error and find them to be without merit.

Appellate Opinion, infra at 40a.

REASONS FOR GRANTING THE WRIT

I.

> Failure to allow a litigant to testify in response to inferences raised on cross-examination, deciding a case on speculation, and relying on items not in evidence is a violation of due process and an abuse of discretion.

One of the most fundamental and cherished rights of citizens of this country is the right, guaranteed under the Fifth Amendment, to be secure in one's property. Under this provision of

the Constitution, we may not be deprived of our property without due process of law. This fundamental right, however, has been denied to the Petitioner.

There is no static definition of due process, but, at minimum it requires that before property can be taken by another, the individual is entitled to a procedure by which he can be heard on the propriety of the taking, and that the decision be made by an unbiased tribunal on the record presented.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation be preceded by notice and opportunity for hearing appropriate to the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Even these minimal procedural safeguards were denied to the Petitioner.

The district court refused to permit Petitioner to testify on redirect during trial, adjourned the trial before Petitioner's testimony was completed, and based the decision a crucial item of pure speculation, and also upon depositions, affidavits, and documentary items that had never been admitted into evidence. The failure to afford Petitioner these minimal constitutional rights compels a reversal and remand.

Although trial procedure must bow somewhat to the practicalities of the cases placed before the court, and although not every trial need afford unlimited opportunities for live testimony, still the courts cannot in the rush to practicality trample the constitutional rights of the litigants and the cornerstones of judicial procedure.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914), quoted in Mullane, 339 U.S. at 314. As this Court has noted, "process which is a mere gesture is not due process." Mullane, 339 U.S. at 315.

The trial court made a mere gesture of due process. It held a hearing but prevented Petitioner from testifying in response to cross-examination in a half-day trial in which Petitioner was the only witness. The trial court did not even define the evidence upon which its ruling was based, and based its ruling on a central item of pure speculation. The trial was an empty shell; it was not due process.

In addition to violating basic constitutional precepts, this action by the trial court violates Federal Rules

of Civil Procedure, Rule 43(a) which provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an (a) act of Congress or by these rules, the Federal Rules of Evidence, or the rules adopted by the Supreme Court.

These procedural safeguards, so cavalierly discarded by the courts below, are not mere holdovers from earlier days, but rather a vital and essential components of due process. They are far too crucial to our system of justice to be sacrificed to the caprices of individual judges.

> The Court traditionally has held that the Due Process clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.***[T]he "property" component of the Fifth Amendment's Due Process clause. . . imposes[s]" constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party

> the opportunity for a hearing on the merits of his cause.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

The trial court's various rulings and improper consideration of evidence outside the record combined to deny Petitioner his constitutional right to due process and violated F. R. Civ. P. 43(a). The Court of Appeals refused to address these issues which were properly raised by petitioner, and erroneously affirmed the trial court's decisions.

CONCLUSION

This petition for certiorari should be granted, to assure that the requirements of due process and the Federal Rules of Civil Procedure are not crushed underfoot in an effort to move

cases through the dockets of the federal courts.

Respectfully submitted,

Ted S. Meikle
FREDRIKSON & BYRON, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, MN 55402
Telephone (612) 347-7040

January 20, 1988

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION :

RUSSELL T. LUND, JR., ET AL. :

vs. :

FLIGHT TRANSPORTATION CORPORATION, ET AL. :

Master Docket No. 4-82-874

FILE NO. 4-82-1578

MEMORANDUM OPINION AND ORDER

WEINER, J.[1] November 21, 1985

On December 2, 1982, plaintiff, Russell T. Lund, Jr. ("Lund"), filed a complaint against American National Bank ("American National") alleging, inter alia, a conversion claim for payment of

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1 Judge Weiner, a district judge in the Eastern District of Pennsylvania, is sitting by designation.

a check over a forged endorsement. [Record Relating to Claim of Plaintiff Russell T. Lund, Jr. Against Defendant Norwest Bank Minneapolis, N.A. With Respect to Allegedly Wrongfully Cleared Check, Tab 1].[2] The parties thereafter reached an agreement whereby American National assigned to Lund a claim for indemnity against Northwestern National Bank of Minneapolis ("Norwest") based upon Norwest's alleged breach of warranties created under the Uniform Commercial Code running in favor of American National. [Tab 19]. On December 27, 1982, Lund filed his First Amended Complaint for Declaratory Relief against Norwest, including, as Count VIII, a claim for conversion on the check and

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2 All subsequent references to this record will simply refer to the Tab number.

the indemnity claim assigned from American National.[3] With the exception of Count VIII, all counts of the First Amended Complaint have been either dismissed or resolved.

Lund proceeded against Norwest on Count VIII of the complaint, asserting the indemnity claim only, by filing a motion for summary judgment upon which the court heard oral argument on March

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3 In the Separate Answer of defendant American National Bank & Trust Company of St. Paul dated February 20, 1985 filed in response to Lund's First Amended Complaint, American National appears to deny that it assigned its indemnity claim to Lund. [Tab 5, at ¶ 5]. However, after reviewing the deposition of William S. Fallon, Vice-President and General Counsel of American National, and the exhibits attached thereto, the court is satisfied that such an assignment, in fact, occurred.

13, 1985.[4] On August 28, 1985, a bench trial was held on this claim. In addition to hearing the testimony of plaintiff, the court also has before it numerous depositions and documentary exhibits.

Plaintiff Lund was a co-founder, outside director, shareholder, and officer of the Flight Transportation Corporation ("FTC," originally known as the Flight Training Center). Subsequent to the company's formation, William Rubin ("Rubin") became a shareholder, director, and the president of FTC. Lund and Rubin purchased a Learjet (the "Learjet 25") in June 1978 and leased it to FTC.

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[4] Norwest also filed a motion for summary judgment on this claim. While the court did not enter an order on this motion, the court orally informed the parties that it was denying their motion due to the presence of material issues of fact.

Their purchase was financed by American National. In December 1978, the jet was destroyed in a crash at the Minneapolis-St. Paul International Airport. The hull insurance proceeds were paid to American National, which applied them to pay off the balance due it on the financing. On February 6, 1979, American National issued a cashier's check, No. C20141, payable to the order of Rubin and Lund in the amount of $342,634.69 [Plaintiff's Exhibit A]. This amount represented the excess of the insurance proceeds over the loan balance of the plane.

Lund claims that he never learned of the check's existence until some time after the Securities and Exchange Commission initiated proceedings against Rubin and FTC on June 18, 1982. The check, however, was deposited into a joint account that Lund and Rubin

maintained at the Fifth Northwestern National Bank of Minneapolis ("Fifth Northwestern"). Norwest accepted the check as a collecting bank. Norwest transferred the check by its endorsement and received payment for it from American National. On the back of the check are endorsements which purport to be the signatures of Rubin and Lund. Lund claims that his signature was forged. Norwest does not deny that the signature on the check is not Lund's.

Lund asserts that Norwest is liable by the following reasoning: First, American National is liable to Lund for conversion under Minn. Stat. § 336.3-419(1)(c)[5] as a result of paying the

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5 Minn. Stat. § 336.3-419(1)(c) provides that:

(1) An instrument is converted when (c) it is paid on a forged indorsement.

check over a forged endorsement. Second, citing Minn. Stat. § 336-116(b)[6] Lund claims that Norwest had no right to obtain payment from American National because he did not endorse the check. Third, citing Minn. Stat. § 336.3-417(1),[7] Lund claims that because American National paid the check in good faith and because Norwest obtained

---

6 Minn. Stat. § 336.3-116(b) provides that:

> An instrument payable to the order of two or more persons (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them

7 Minn. Stat. § 336.3-417(1)(a) provides:

> (1) Any person who obtains payment or acceptance and any prior transferor, warrants to a person who in good faith pays or accepts that
>
> (a) he has a good title to the instrument . . .

payment from American National, Norwest warranted to American National that it had good title to the check. Of course, Lund asserts that Norwest did not have good title because his signature was forged. Thus, Norwest is allegedly liable to Lund because Lund, by virtue of the assignment, can assert American National's claim against Norwest.

Norwest contends that Lund and Rubin were partners engaged in the purchase, lease, and sale of aircraft. Its principle defense, therefore, relying on Minn. Stat. § 336.110(g), is that Rubin was authorized to endorse the check on behalf of the partnership.[8] Lund

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[8] Minn. Stat. §336-110(g) provides that an instrument may be payable to the order of:

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

denies that a partnership relationship existed. Alternatively, Lund maintains that even if a partnership existed, Norwest's defense is based on the unfounded assumptions that Rubin forged Lund's signature and used the proceeds of the check for the benefit of the partnership.

Between 1978 and 1982, Lund and Rubin purchased six airplanes. The account that Lund and Rubin maintained at Fifth Northwestern was opened in July, 1978, shortly after their first purchase of an airplane. The account, known as "the R & L Jet Account," was an "operational account" used to facilitate transactions involving the planes they owned and leased to FTC. Lease payments from FTC were deposited into the account and checks were drawn on the account to pay for expenses related to the planes.

Lund testified that as a result of his ownership and leasing of the airplanes, he expected to realize benefits on his personal income tax returns through investment tax credits and loss deductions. Due to the provisions of the tax code and the desire to provide the aircraft to FTC on beneficial terms, it appears that Lund expected to operate the planes at a loss. [Tab 26 at p. 317]. Lund stated that most of the time, he and Rubin would share any losses fifty-fifty. [Id. at 318]. While Lund and Rubin generally intended to contribute equal shares of capital necessary for the purchase and operation of the airplanes, Lund possessed greater financial resources than Rubin and sometimes contributed a greater than fifty percent share toward given transactions. [Id. at 315-317].

Lund testified that he and Rubin owned the Learjet 25 which crashed as co-owners, not as partners. He stated that this form of ownership was deliberately chosen because he thought that co-ownership, as opposed to partnership, would maximize his tax benefits. He also noted that his prior experience with partnership ventures left him uncomfortable with that kind of arrangement. The FAA Aircraft Registration Application has a section entitled "Type of Registration." The five types listed are: (1) individual; (2) partnership; (3) corporation; (4) coowner; and (5) government. Rubin prepared the form for the Learjet 25 and checked off the box next to co-owner. [Tab 33].

The details regarding the purchase and operations of the airplanes were handled by Rubin. Rubin kept all books

and records relating to the airplanes. Rubin kept the check ledger of the Fifth Northwestern account and drew all checks written on the account. Rubin, alone, had access to the post office box in St. Louis Park, Minnesota to which statements from the Fifth Northwestern account were sent. Rubin made the lease payments from FTC and deposited them in the Fifth account. Rubin handled the arrangements regarding the insurance of the aircraft. Listed as an additional insured on the policy covering the Learjet 25 (Flight Training Center, Inc. was the named insured) is "R & L Investments, a partnership, William Rubin and Russell T. Lund, Jr." [Tab 35]. The address given for R & L Investments is the same address to which the bank statements from the Fifth account were sent.

Although Lund had a right to

inspect the books and records relating to the airplanes, he never requested access to do so. Lund testified that he could have requested access to the St. Louis Park post office box, but didn't feel that it was necessary. He never examined any statements from the Fifth account. While he made some deposits into the account, he never drew any checks on it.

The Uniform Partnership Act, adopted by Minnesota, Minn. Stat. §§ 323.01 et seq. defines a partnership as "an association of two or more persons to carry on as coowners a business for profit." Minn. Stat. § 323.02, subd. 8. Lund acknowledges that an essential element of a partnership, that of coownership, is present in the case sub judice. However, citing to the less favorable tax treatment which a partner-

ship would have received, Lund claims that he and Rubin never intended to form a partnership.

The court will not look to the Internal Revenue Code, or the plaintiff's understanding of it, as a source of partnership law. More appropriate is the Official Comment to the Uniform Partnership Act section which defines a partnership. It states, in part, that:

> The definition [of a partnership] asserts that the associates are "co-owners" of the business. This distinguishes a partnership from an agency - an association of principal and agent. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control.
>
> Lastly, the definition asserts that the business is for profit. Partnership is a branch of our commercial law; it has developed in connection with a particular business association, and it is, therefore, essential that the operation of the act should be confined to associations organized for profit.

6 U.L.A. 23 (1969). The partnership statute itself also provides several guidelines for determining whether a partnership exists. Minn. Stat. § 323.06. One factor to be considered is that "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." Minn. Stat. § 323.06(4).

Applying these considerations to the evidence presented, the court concludes that Lund and Rubin combined their efforts and property to carry on as co-owners a business for profit. First, the element of co-ownership is undisputed. Second, Lund and Rubin engaged "in a series of acts directed toward an end." That is, they purchased six airplanes together and carried out the steps necessary for their leasing

and operation with the aim of realizing benefits on their personal income tax returns.[9] Third, each contributed something to the venture and they agreed upon how the benefits derived therefrom were to be divided. The partnership statute requires no more than this in

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9 An affidavit filed by Lund states that, "the arrangements for each plane were worked out separately from the other planes, each as an individual transaction." [Exhibit A, Rebuttal Memorandum in Support of Motion for Summary Judgment.] Accordingly, he asserts that the other planes they purchased together have "no relevance to the nature of their ownership of the Learjet that crashed." [Rebuttal Memorandum at 5]. However, even if the purchase of each plane is viewed as a discrete transaction, it does not negate the view that the transactions were a series of acts directed toward making a profit. Moreover, even if the court focused solely on the plane that crashed, the plane was purchased, leased, and operated in order to confer a benefit to Lund and Rubin and they were required to perform a series of acts before any benefits could be realized.

order to establish the existence of a partnership.[10]

Lund contends, however, that the bank's partnership defense cannot stand because there is no evidence that Rubin forged Lund's endorsement. Lund has not challenged the authenticity of Rubin's signature. The Official Comment to § 3-110 of the Uniform Commercial Code

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10 Although the "benefits" derived from the business venture were not in the form of profits, but in the form of losses which had favorable tax consequences, the court construes Minn. Stat. §323.06(4) as broad enough to encompass the splitting of losses as well as the splitting of profits. Furthermore, we note that Rubin's handling of the details of the many transactions involving the airplanes does not preclude the finding of a partnership. It is well settled that a partnership may be found where one party contributes services and another party contributes capital, so long as there is a splitting of the profits between them. Cyrus v. Cyrus, 64 N.W. 2d 538 (Minn. 1954).

provides that "any person having authority from the partnership or association to whose order the instrument is payable may endorse or otherwise deal with the instrument." Since the authenticity of Rubin's signature has not been challenged and since Rubin, as a partner, had the authority to endorse the check on behalf of the partnership, the identity of the party who signed Lund's name to the check is of no consequence.

Lund further maintains that Rubin's endorsement was unauthorized because the proceeds of the check were not used in furtherance of partnership business. Relying on Minn. Stat. § 323.08,[11]

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11 Minn. Stat. §323.08 provides, in pertinent part, that:

> An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

Lund notes that the existence of the check was hidden from him by Rubin for over two years. Rubin, however, had the authority to endorse the check and he deposited it in an account maintained by the partnership for the transaction of partnership business. The deposit of a check, issued pursuant to partnership business, into a partnership account, is indicative of carrying on the partnership business in the usual way. That Rubin subsequently used the proceeds for himself should not serve to impose liability on Norwest who was without reason to suspect Rubin's dishonesty. Furthermore, it was only through Lund's acquiescence in Rubin's handling of the details of the partnership that Lund failed to discover the check. Accordingly, the court finds that Norwest has maintained a valid partnership defense.

In accordance with Rule 52(a) of the Federal Rules of Civil Procedure, the above Memorandum Opinion constitutes this court's findings of fact and conclusions of law.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

RUSSELL T. LUND, JR., ET AL.

vs.

FLIGHT TRANSPORTATION CORPORATION, ET AL.

Master Docket No. 4-82-874

File No. 4-82-1578

NOVEMBER 21, 1985

ORDER

The court finds in favor of the defendant, Norwest Bank Minneapolis, N.A. and against the plaintiff, Russell T. Lund, Jr.

Judgment is entered in favor of the defendant and against the plaintiff.

IT IS SO ORDERED.

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-5075

In Re: Flight Transportation Corporation Securities

Russell T. Lund, Jr.,

Appellant,

v.

Norwest Bank, Minneapolis and American National Bank and Trust, St. Paul,

Appellees.

Appeal From The United States District Court For the District of Minnesota

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Submitted: March 18, 1987
Filed: August 4, 1987

Before McMillian, Circuit Judge, Henley, Senior Circuit Judge, and Arnold, Circuit Judge.

McMILLIAN, Circuit Judge.

Russell T. Lund, Jr., appeals from a final judgment entered in the United States District Court[1] for the

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[1] The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

District of Minnesota, following a bench trial, in favor of Norwest Bank Minneapolis, N.A. (Norwest), and American National Bank & Trust Co. of St. Paul (ANB) on his claim that Norwest and ANB had converted a cashier's check by paying the check over his forged endorsement. In re; Flight Transportation Corp. Securities Litigation, No. 4-82-1578 (Master Doc. No. 4-82-874) (D. Minn. Nov. 21, 1985), (Pre-trial Order No. 257). For reversal appellant argues the district court erred in (1) denying his motion for summary judgment, (2) finding appellant and Rubin were partners, and (3) making certain evidentiary rulings. For the reasons discussed below, we affirm the judgment of the district court.

This appeal was argued during the October 1986 session. During oral

argument, counsel was questioned about the finality of the district court judgment and the absence of a Fed. R. Civ. P. 54(b) certification. In November 1986, this court, on its own motion, remanded the case to the district court for the limited purpose of considering whether to grant Rule 54(b) certification on a nunc pro tunc basis. On remand, the district court certified its order dated November 21, 1985, as final for purposes of appeal under Fed. R. Civ. P. 54(b), and the certification was received by this court in March 1987.

"[Rule] 54(b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties; to do so, the court must make an express determination that there is no just reason for delay."

Curtiss-Wright Corp. v. General Elecric Co., 446 U.S. 1, 3 (1980). In making determinations under Rule 54(b),

> [a] district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action."
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> Once having found finality, the district court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a "dispatcher." It is left to the sound judicial discretion of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised "in the interest of sound judicial administration."

. . . .

> There are . . . two aspects to the proper function of a reviewing court in Rule 54(b) cases. The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Id. at 7-8, 10, citing Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435-37 (1956); see, e.g., Hayden v. McDonald, 719 F.2d 266, 268-69 (8th Cir. 1983); Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 364 (3d Cir. 1975) (relevant factors to consider in

reviewing "equities" of Rule 54(b) certifications).

We hold the district court did not abuse its discretion in certifying the judgment dated November 21, 1985, as final for purposes of appeal under Rule 54(b). We agree with the district court that the November 21, 1985, order was a final judgment because it completely disposed of the individual claim between Lund and Norwest and ANB and that there was no just reason to delay entry of judgment and the subsequent appeal. In re Flight Transportation Corp. Securities Litigation, No. 4-82-1578 (Master Doc. No. 4-82-874) (Dec. 19, 1986) (Rule 54(b) order). We agree with the district court that there is no significant relationship between the adjudicated and unadjudicated claims, there is no possibility that the appeal of the judgment

would be mooted by future developments in the underlying Flight Transportation Corp. Securities litigation (FTC litigation),[2] there is no possibility that this court would be obliged to consider the issues raised in the appeal a second time, and there are no claims or counterclaims that could result in a setoff against the judgment. Id. at 4-5. The district court's assessment that there is nothing to be gained by delaying this appeal pending resolution of the underlying FTC litigation and that an immediate appeal is in the interest of sound judicial administration is clearly reasonable. Id. at 5-6.

The following statement of facts is taken in large part from the district

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[2] See In re Flight Transp. Corp. Securities Litigation, 794 F.2d 318 (8th Cir. 1986) (settlement), cert. denied, 107 S. Ct. 1886 (1987).

court's memorandum opinion and orders. Lund was a co-founder, outside director, shareholder, and officer of the ill-fated Flight Transportation Corp. (FTC), which was originally known as the Flight Training Center. William Rubin later became a shareholder, director and president of FTC. In June 1978 Lund and Rubin together purchased a Learjet and leased it to FTC. ANB financed the purchase of the aircraft. In December 1978 the aircraft was completely destroyed in a crash at the Minneapolis-St. Paul International Airport. After some investigation, the insurer paid the proceeds of the aircraft insurance policy to ANB. ANB applied the insurance proceeds to the financiing agreement and, on February 1, 1979, issued a cashier's check payable to the order of "William Rubin & Russell T. Lund Jr."

for $342,634.69, the amount the insurance proceeds exceeded the loan balance.

On February 9, 1979, the check, apparently endorsed by both Rubin and Lund, was deposited in the joint checking account (the "jet account") that had been opened by Rubin and Lund at Fifth Northwestern National Bank of Minneapolis (now Norwest Bank Calhoun Isles) to handle the financial transactions associated with the acquisition and maintenance of the Learjet and other aircraft. Fifth Northwestern National Bank transmitted the check for collection to Norwest. Norwest, as the collecting bank, submitted the check to ANB for payment. ANB paid the check, and Norwest forwarded the proceeds to Fifth Northwestern National Bank, which then credited the jet account. After

February 9, 1979, funds deposited in the jet account, in excess of the amount of the check in question, were used to purchase and maintain other aircraft subsequently purchased by Rubin and Lund.

Lund claimed that he did not know anything about the check until sometime after the Securities and Exchange commission had initiated proceedings against Rubin and FTC in June 1982. Lund alleged that he did not endorse the check (his first name was misspelled), his endorsement is a forgery, and Rubin misappropriated the proceeds.[3] Norwest denies that Lund's endorsement is a forgery but does not dispute that Lund did not personally endorse the

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3 Following the SEC investigation of FTC, Rubin was convicted of securities fraud and has been sentenced to a term of imprisonment and fined.

check. Lund's forged check claim was filed in December 1982 in connection with the underlying FTC Litigation. As one of FTC's outside directors, Lund entered into the 1985 settlement agreement, which was later approved by this court in In re Flight Transportation Corp. Securities Litigation,, 794 F.2d 318 (8th Cir. 1986), cert. denied, 107 S. Ct. 1186 (1987). Pursuant to the settlement agreement, Lund relinquished, as consideration for his consent to the settlement agreement, all FTC-related claims except for certain claims that were specifically reserved. One of the specifically reserved claims was Lund's forged check claim against Norwest and ANB (count VIII).

Pursuant to he terms of the settlement agreement, the district court servered and tried the forged check

claim. Lund claimed that (1) ANB was liable for conversion because it paid the check over a forged endorsement, Minn. Stat. Ann. § 336.3-419 (1) (c) (1966 & West Supp. 1987); (2) Norwest wrongfully submitted the check for collection to ANB, id. § 336.3-116(b) (incomplete endorsement); and (3) Norwest erroneously warranted that it had good title to ANB, which paid the check in good faith, id. § 336.3-417 (1) (a).

Norwest and ANB argued that Rubin and Lund were partners in the aircraft business and that Rubin, as a partner, was authorized to endorse the check on behalf of the partnership, id. §§ 323.08 (1981 & West Supp. 1987) (partners as agents of partnership), 336.3-110(g), 336.3-403(1). Thus, it is implicit in the argument of Norwest and ANB that

Rubin signed the check both in his own name and also, acting as Lund's partner, in Lund's name.

Cross motions for summary judgment were denied, and a bench trial was held in August 1985. Lund was the only witness to testify at the trial; the parties introduced into evidence documentary exhibits and depositions, and the district court allowed the parties to submit additional written evidence after trial by mail. The district court found that Rubin and Lund were partners in the aircraft leasing business and that Rubin had endorsed the check in Lund's name as a partner and then deposited the check in the checking account used for partnership business. In re Flight Transportation Corp. Securities Litgation, No. 4-82-1578 (Master Doc. No. 4-82-874) (Pre-trial Order No. 257), slip op. at

9-11. This appeal followed.

Lund first argues that the district court erred in denying his motion for summary judgment. We disagree. There were genuine issues of material fact in dispute, specifically the related questions whether Rubin and Lund were partners in the aircraft leasing business and whether Lund's signature was unauthorized and thus a forgery.

Lund next argues that there was no evidence to support the district court's finding of partnership. Lund specifically argues that he did not intend to form a partnership with Rubin. Lund further argues that even if the district court correctly found that they were partners, Rubin's endorsement of the check in Lund's name was not in furtherance of partnership business and thus was not authorized. We disagree.

We hold the district court's finding of partnership is not clearly erroneous. Under Minnesota law, a partnership is an "association of two or more persons to carry on as co-owners as business for profit."

> It is essential to the existence of a partnership that there be a joint contribution to the enterprise and something in the nature of a community of interest. When parties contribute their experience, their capital, and their energies to a common enterprise, in which they are to share the profits, a partnership may result, notwithstanding an expressed intention not to create such a relationship.

Hansen v. Adent, 238 Minn. 540, 545, 57 N.W.2d 681, 684 (1953) (citation omitted). The record supports the district court's finding that between 1978 and 1982 Rubin and Lund were partners engaged in the aircraft leasing business. Together, Rubin and Lund pur-

chased six aircraft; Lund contributed more capital than Rubin did, but Rubin contributed his managerial expertise and handled the day-to-day matters, including the financial records, insurance and bank accounts. They opened a joint checking account at the Fifth Northwestern National Bank for the aircraft leasing business; aircraft lease payments were deposited in and expenses were paid from this account. They expected to realize tax benefits from investment tax credits, business deductions and losses attributable to the partnership.

Rubin's status as a partner in the aircraft leasing business made him Lund's agent with respect to third parties, such as Norwest and ANB, for the purpose of carrying on the usual business of the partnership and thus provided him with

the implied authority, as a partner, to endorse Lund's name on the check and to deposit the check in the jet account. See Minn. Stat. Ann. § 323.08; see, e.g., Keane v. Pan American Bank, 476 N.E.2d 895, 900-01 (Ind. Ct. App. 1985) (missing endorsement); Grosberg v. Michigan National Bank, 420 Mich. 707, 362 N.W.2d 715, 719-22 (1984). Because the Uniform Commercial Code (UCC) defines a forged endorsement as a form of "unauthorized signature," a signature that is authorized is not a forgery under the UCC. Minn. Stat. Ann. § 336.3-404(1); compare Grosberg v. Michigan National Bank, 362 N.W.2d at 719 (partnership; implied authority to endorse), with Quintana v. Allstate Insurance Co., 378 N.W.2d 40, 43-44 (Minn. Ct. App. 1985) (no partnership; no authority to endorse). Because Rubin

had the authority, as a partner, to sign the check on behalf of Lund, Lund's endorsement was not a forgery. There were no restrictions on Rubin's authority as a partner to endorse and negotiate checks in the course of carrying on the usual business of the partnership; in fact, due to Lund's acquiescence[4] in Rubin's doing so, Rubin had exclusive control over the financial arrangements of the partnership, including the handling of the jet account.

In addition, we note that there is an alternative, independent ground

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4 The affirmative defense of contributory negligence was not raised by Norwest and ANB and was therefore waived. Because the district court decided the case on the partnership ground, the district court's reference to Lund's arguably negligent acquiescence in Rubin's handling of the jet account is not necessary to its analysis.

that supports the district court's conclusion. The jet account was an active account. After Rubin deposited the insurance check and other checks inthe jet account, funds substantially in excess of the amount of the insurance check were later paid out of that account to cover the legitimate expenses of the aircraft leasing business. There was no guarantee that Lund would have received any of the proceeds of the insurance check even if he had endorsed the check. Under these circumstatnces, Lund did not suffer any actual loss and therefore could not recover any damages. See Boyer v. First National Bank, 476 N.E.2d at 901; W.S. Clark & Sons v. Union National Bank, 84 N.C. App. 686, 353 S.E.2d 439, 440 (1987).

We have reviewed Lund's claims of evidentiary error and find them to be

without merit.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

RUSSELL T. LUND, JR., ET AL.

vs.

FLIGHT TRANSPORTATION CORPORATION, ET AL.

Master Docket No. 4-82-874

FILE NO. 4-82-1578

ORDER

WEINER, J. January 15, 1986

After careful review and reconsideration of this Court's Memorandum Opinion and Order dated November 21, 1985, the Court AFFIRMS that Memorandum Opinion and Order.

The motion of the plaintiff, Russell T. Lund, Jr., for amended find-

ings or, in the alternative, for a new trial is DENIED.

IT IS SO ORDERED.

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Charles R. Weiner

Filed: January 21, 1986
Franois E. Dosal, Clerk

By_____
Deputy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES :

RUSSELL T. LUND, JR., Appellant, :

vs. :

NORWEST BANK, MINNEAPOLIS, ET AL. Appellees. :

No. 86-5075MN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 22, 1987

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals,
Eighth Circuit.